

IN THE  
**Supreme Court of the United States**

October Term 1920

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Original No. 24

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IN RE THE CHICAGO, ROCK ISLAND  
AND PACIFIC RAILWAY COMPANY,  
*Petitioner.*

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**MOTION OF THE TOLEDO ST. LOUIS AND WEST-  
ERN RAIROAD COMPANY FOR LEAVE TO  
FILE BRIEF AND BE HEARD IN  
ORAL ARGUMENT.**

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THOS. H. TRACY,  
GEO. D. WELLES,  
*Solicitors for Toledo, St. Louis  
and Western Railway Company.*

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Now comes The Toledo, St. Louis and Western Railroad Company by its solicitors Thomas H. Tracy and George D. Welles and respectfully moves for leave to file a brief in opposition to the petition herein, and by its said solicitors to be heard upon the argument of said cause as a party in interest in the event oral argument is heard in behalf of the petitioner, and in the alternative moves that its said solicitors be granted leave as *amici curiae* to file said brief. Thirty copies of said brief have been lodged with the clerk of this Court.

The ground for this motion is that the petition herein seeks to restrain further proceedings by the District Court of the United States for the Northern District of Ohio, Western Division, upon a cross-bill filed by the Toledo, St. Louis and Western Railroad Company seeking relief against the Chicago, Rock Island and Pacific Railway Company as a party to a suit pending in said court. Said Toledo, St. Louis and Western Railroad Company is vitally interested in sustaining the jurisdiction of said District Court over said Chicago, Rock Island and Pacific Railway Company in said suit as a party to said cross-bill.

By reason of the foregoing facts the Toledo, St. Louis and Western Railroad Company respectfully submits that it is a party in interest and prays leave through its solicitors to appear herein in defense of the jurisdiction of said District Court.

Notice of this motion has been served on opposing counsel.

Respectfully submitted,

THOS. H. TRACY,

GEO. D. WELLES,

*Solicitors for Toledo, St. Louis  
and Western Railway Company.*

OCTOBER 4, 1920.

IN THE  
**Supreme Court of the United States**

October Term, 1920

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Original No. 24

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IN RE THE CHICAGO, ROCK ISLAND  
AND PACIFIC RAILWAY COMPANY,  
*Petitioner.*

RETURN OF THE DISTRICT COURT OF  
THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF OHIO,  
WESTERN DIVISION, TO THE RULE  
TO SHOW CAUSE AWARDED JUNE  
7, 1920.

IN THE  
**Supreme Court of the United States**

October Term, 1920

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IN RE THE CHICAGO, ROCK ISLAND  
AND PACIFIC RAILWAY COMPANY,  
*Petitioner.*

RETURN OF THE DISTRICT COURT OF  
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NORTHERN DISTRICT OF OHIO,  
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7, 1920.

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The District Court of the United States for the Northern District of Ohio, Western Division, by the undersigned, John M. Killits, Judge of said court, respectfully makes the following return to the rule to show cause why a writ of prohibition or of mandamus

should not issue herein as prayed for in the petition herein filed June 7, 1920, viz :

A bill of complaint was filed in said court on October 22, 1914, by Horatio C. Creith, as alleged in the petition herein. An answer was filed to said bill as alleged and an order entered appointing a receiver, which contained among other provisions those summarized in the petition herein. Said order also contained a provision to the effect that "the receiver, the defendant, or any creditor or stockholder thereof shall be permitted to plead to and contest the amount, validity and priority of any and all such claims," i. e. claims against the Railroad Company.

Edwin G. Merrill, et al., on December 10, 1914, filed in said cause a petition, referred to in the petition herein, to which a copy of the bondholders' protective agreement was attached, and which contained among other allegations and prayers, those summarized in the petition herein. In said bondholders' agreement it was also provided, among other things that the depositors thereunder did "authorize and empower the said committee in the name of the depositors or in the name of the committee or in the name of any other person or persons, corporation or corporations, as the committee may deem proper, to institute, maintain, or take or cause to be instituted, maintained or taken, or to intervene in, or become a party to such actions or

proceedings in law, or in equity, or otherwise, \* \* \* as will in the judgment of the committee tend to protect the interests of the depositors and to enforce the rights and the security provided by said bonds, coupons, trust agreement and pledge." Said bondholders' agreement contained a provision by which any bondholder who did not assent to any plan or agreement for reorganization of the Company might withdraw his bonds; and another provision by which the committee was empowered whenever it might deem proper, to terminate the agreement and return the bonds to the depositor; and a provision to the effect that "neither the committee nor the depositary assumes any responsibility or liability as to the genuineness, validity or regularity of any of the deposited bonds."

The plaintiff Creith, on December 28, 1914, answered the petition of Merrill, et al, as alleged in the petition herein.

On March 8, 1915, by leave of court, Merrill, et al, filed a so-called dependent bill on behalf of themselves and other owners of the gold bonds of 1917 as alleged in the petition herein.

Merrill et al, thereupon filed motions as alleged in the petition herein and the court made an order thereon as set forth in said petition, and thereupon Merrill, et al, filed an answer and cross bill on August

2, 1915. In said cross bill said committee set forth their alleged rights under the terms of said bondholders' agreement and alleged that they held thereunder bonds in the aggregate principal face amount of Ten Million Two Hundred and Ninety-five Thousand Dollars (\$10,295,000.00), with certain unpaid interest coupons thereon, out of a total principal amount of bonds of \$11,527,000.00. Said cross bill alleges, among other things (pp. 29 and 30), "These defendants, cross-complainants, and cross-plaintiffs file this counter-claim, cross-bill and cross-suit on behalf and for the benefit of themselves and/of all other holders of said gold bonds of 1917 who may elect to become parties to this counterclaim, cross-bill and cross-suit \* \* \*". The prayer of said cross-bill is in part, "That these defendants, cross-complainants, and cross-plaintiffs be awarded judgment against the defendant Railroad Company for the amount of said gold bonds of 1917 held or to be held by them, together with all interest accrued thereon, and for their costs; and that the court ascertain, establish and enforce by appropriate orders and decrees, the amounts so adjudged or found to be due to these defendants, cross-complainants and cross-plaintiffs, and to any other creditors whom the court may find to be entitled to share with these defendants in the property and assets of the defendant Railroad Company, or the proceeds thereof."



Neither the petition, the answer nor the cross-bill of said Edwin G. Merrill, et al, contained any allegation with respect to any bonds having been deposited with said committee by the Chicago, Rock Island and Pacific Railway Company, and it nowhere appears in any pleading filed prior to the filing of the cross-bill of Toledo, St. Louis and Western Railroad Company on March 1st, 1918, of which complaint is made in the petition herein, that the Chicago, Rock Island and Pacific Railway Company had deposited \$5,047,000.00 par value B. bonds and \$400,000.00 A. bonds, or any other amount of either of said bonds with said committee.

Mr. Lawrence Maxwell's name did not appear on any pleading filed by Merrill, et al, as one of counsel for said bondholders' committee and counsel of record for that committee disclaimed before the special master any right to appear or act for the Chicago, Rock Island and Pacific Railway Company.

The Central Trust Company of New York, on October 18, 1915 (not March 5, 1917, as alleged in the petition herein) by counsel other than Mr. Maxwell, filed a cross bill as trustee under the collateral trust agreement of August 1st, 1907, to foreclose the lien of the collateral trust bondholders on the shares of Chicago and Alton stock pledged by said agreement to secure said bonds.

On November 9, 1915, Jules S. Bache, et al, as a stockholders' protective committee (representing stockholders of Toledo, St. Louis & Western Ry. Co.) filed an answer to the answer and cross bill of Edwin G. Merrill, et al, in which answer the stockholders' protective committee made the following, among other allegations:

"On information and belief that certain officers and directors of defendant, including one Edwin Hawley and other persons whose names are to them unknown, together with one Benjamin F. Yoakum, who at that time was chairman of the board of directors of the Rock Island Company, were at the time of said attempted sale of said shares of preferred and common stock of the Alton Company to the defendant, financially interested in and owned certain of said shares of stock, all which was well known to the Trust Company, the Rock Island Company and the other parties and persons owning said preferred and common stock, and was unknown to the other officers, directors and stockholders of defendant; that the price at which said preferred and common stock was purported to be sold to the defendant was very much in excess of the real value or market value thereof, as said Rock Island Company, and the other parties and persons owning said stock, and the said certain officers and directors of defendant, who were financially interested in said stock,

each and all well knew; that for want of knowledge they are unable to more definitely state the excess value at which said stock was so purported to be sold to the defendant; that the proceeds and alleged bonds representing said excessive price for said Alton stock received by the Rock Island Company as a result of and from the purported sale of said stock to the defendant were divided and distributed by the Rock Island Company with the knowledge and consent of the other parties and persons financially interested in said stock, with said certain officers and directors of the defendant, in pursuance of and compliance with a secret agreement and understanding between said Rock Island Company and the other parties and persons interested in said stock of the one part, and said certain officers and directors of the defendant of the other part, to the effect that such proceeds and bonds should be so divided and distributed, fraudulently, and without the knowledge or consent or approval of the other officers, directors or stockholders of said defendant; that the present holders of a large part, if not all of said series "A" and series "B" bonds knew at the time they acquired their bonds respectively, of said fraud practiced by and between the Rock Island Company and the persons and parties financially interested in said preferred and common stock of the one part, and of said certain officers and directors of the

defendant of the other part; that by reason of the facts aforesaid said bonds in the hands of said holders are invalid, void and unenforceable."

On March 5, 1917, an order was made appointing Guy W. Kinney Special Master to take testimony, of which order a copy appears beginning on page 15 of the petition herein.

Testimony has since been taken by said Special Master covering many thousands of typewritten pages. The taking of said testimony has not yet been completed and said Special Master has not yet made his final report thereof to the Court.

On March 1st, 1918, there came regularly on for hearing in said cause a motion of Toledo, St. Louis & Western Railroad Company for leave to file a pleading entitled "Answer of Toledo, St. Louis and Western Railroad Company to the answer and cross-bill of Edwin G. Merrill, et al, and cross-bill of Toledo, St. Louis and Western Railroad Company." Upon the hearing of said motion, said pleading was tendered to and examined by the court.

Said cross-bill contained allegations, among others, to the following effect:

That the Chicago, Rock Island and Pacific Railway Company, referred to in said pleading as the "Rock Island Company" had attempted to sell to the

Toledo, St. Louis and Western Railroad Company one hundred and forty-four thousand two hundred (144,200) shares of common stock and sixty-three thousand eight hundred shares (63,800) of preferred stock of the Chicago and Alton Railroad Company; that one hundred and forty-four thousand two hundred shares of common stock and forty-one thousand one hundred shares of said preferred stock were owned by the Rock Island Company and that others owned the remainder of said stock and that the Rock Island Company acted for them in attempting to make the sale thereof; that one Edwin Hawley was then a director and vice-president of the Toledo, St. Louis and Western Railroad Company and its sole representative in the negotiations for the attempted purchase of said Chicago and Alton stock; that said Hawley was one of the owners of the Chicago and Alton stock for whom the Rock Island Company was acting in said transaction; that the price at which it was attempted to sell said stock to the Toledo, St. Louis and Western Railroad Company was more than double the real and market value of said stock; that Hawley's interest in said stock was by a fraudulent arrangement between himself and the Rock Island kept secret from all of his associate officers and directors of the Toledo, St. Louis and Western Railroad Company; and that it was agreed between the Rock Island Company and said Hawley

"that said Edwin Hawley, individually, should be paid by and receive from the Rock Island Company for his services in procuring and inducing this defendant to purchase said Alton stock the sum of one hundred and ninety-three thousand (\$193,000.00) dollars in cash; that in pursuance of said secret agreement said Edwin Hawley did induce and fraudulently bring about said purported purchase of said Alton stock by this defendant and said Rock Island Company paid and caused to be paid to said Edwin Hawley on or about the 4th day of October, 1907, and said Edwin Hawley received from the Rock Island Company said sum of one hundred and ninety-three thousand dollars (\$193,000.00) for the consideration aforesaid, all without the knowledge of this defendant or of any of the other directors or officers of this defendant;" that said money was received by Hawley for his own use and kept by him in pursuance of said secret and fraudulent arrangement between himself and the Rock Island Company; said cross-bill further alleged "That as a part of said attempted purchase by this defendant of the stock of the Alton Company all of said series "A" and "B" bonds were delivered as aforesaid to the Rock Island Company or its order by the Trust Company at the time of the purported purchase of the said Alton stock and that all of said "B" bonds amounting to five million forty-seven thousand

dollars (\$5,047,000.00) par value and \$400,000.00 par value of "A" bonds are now owned by the Rock Island Company and have been by it so owned continuously since the date that they were delivered to it by the Trust Company as aforesaid"; that a large part of the remainder of the "A" bonds aggregating six million and eighty thousand dollars (\$6,080,000.00) par value "were by the Rock Island Company or through its acts placed and are now in the possession of parties and persons who claim to be good faith holders thereof" without knowledge of the fraud in their inception, and that if the Toledo, St. Louis and Western Railroad Company is obliged to pay any of said bonds owned by good faith holders that it would thereby "through the fraud and wrongdoing of the Rock Island Company as hereinbefore set forth" be damaged in the amount it might so be required to pay and that it has also been damaged by reason of the fraud and wrongdoing of the Rock Island in an amount of approximately one million dollars (\$1,000,000.00) being the excess interest paid by it on the "A" and "B" bonds over the dividends received on the Alton stock, and The Toledo, St. Louis and Western Railroad Company tenders the Alton stock for such disposition as the court may deem proper upon cancellation of all of the "A" and "B" bonds.

The cross-bill sets out the filing of the cross-bill by

the Central Trust Company asking for the sale of the Alton stock, its application to the bonds and judgment for the deficiency against the Toledo, St. Louis and Western and recites that the Toledo, St. Louis and Western has filed an answer to said cross-bill of the Central Trust Company and that the stockholders' committee has filed an answer thereto as well as the Western Union Telegraph Company as a creditor, and that all of said pleadings raised the same issues as to the validity of the bonds as in the pleadings of the Toledo, St. Louis and Western Railroad Company; alleges all of such issues were referred on the 5th day of March, 1917, to a special master for the purpose of taking testimony; that the taking of such testimony began on April 2, 1917, and "That upon the beginning of the taking of said testimony before said special master, said The Chicago, Rock Island & Pacific Railway Company, under the authority of the order entered by this court on the 22nd day of October, 1914, to which order reference is hereby made, intervened and appeared by its counsel and entered its appearance herein, and from time to time, since said date, has, as the owner and holder of certain of said A bonds and as the owner and holder of all of said B bonds, by virtue of said order last mentioned, and of the said answer and cross-bill of said Bondholders' Committee participated in the taking of testimony and in making objections and taking



exceptions to testimony offered, and in making stipulations as to matters occurring during said hearing: that thereby said The Chicago, Rock Island & Pacific Railway Company has entered its appearance in this suit, and has become a party hereto, and has rendered itself subject to the jurisdiction of this court herein."

The prayer of the cross-bill is as follows:

"(a) That the answer and cross-bill of Edwin G. Merrill et al, as a Bondholders' Committee may be dismissed; that the alleged bonds described in said answer and cross-bill be declared to be null and void and that said Edwin G. Merrill et al, as a Bondholders' Committee and each and all of the owners and holders of said bonds be forever enjoined from enforcing or attempting to enforce any of said bonds or any of said interest coupons thereof against this defendant or its property and assets; and said Edwin G. Merrill et al, as a Bondholders' Committee, The Chicago, Rock Island & Pacific Railway Company and each and all other owners and holders of said bonds be ordered to cancel and surrender said bonds and the interest coupons thereof and each and all of the same to this defendant.

(b) That in the event any of said A bonds are found to be valid obligations of this defendant, and that the holders thereof are good faith owners of same, that the court order, decree and adjudge that this de-

fendant shall have and recover of The Chicago, Rock Island & Pacific Railway Company any and all sums which it may be by said order and decree required to pay to such good faith bondholder, if any, together with interest thereon.

(c) That the court take an accounting of the amount which this defendant has paid for and on account of the interest upon said A and B bonds in excess of the amount which it has received as dividends upon said Alton stock, and that it may have and recover from said The Chicago, Rock Island & Pacific Railway Company such excess amount with interest thereon.

(d) That The Chicago, Rock Island & Pacific Railway Company may be held to be a party to this suit and required to answer hereto within the time required by law, or failing so to do that the allegations hereof shall be taken as confessed by said The Chicago, Rock Island & Pacific Railway Company.

(e) This defendant further prays for all relief to which it may be entitled by reason of the premises."

Upon said hearing on said motion for leave to file said answer and cross-bill evidence was introduced tending to prove the truth of the allegations in the cross-bill of Toledo, St. Louis and Western Railroad Company to

the effect that The Chicago, Rock Island and Pacific Railway Company had intervened in said cause in its own name and in its own right and had entered its appearance therein and had become a party to said cause and subjected its person to the jurisdiction of said court.

On March 1, 1918, as a result of the hearing just above mentioned, the court, in the exercise of its judicial discretion, entered an order granting leave to file said answer and cross-bill of the Toledo, St. Louis and Western Railroad Company, and said pleading was on March 1, 1918, duly filed.

On March 11, 1918, there was filed in said court a notice directed to "Chicago, Rock Island and Pacific Railway Company, Lawrence Maxwell, Solicitor" and signed by the solicitors for the parties who had filed said pleadings on March 1, 1918, which notice was as follows:

"There is handed you herewith duly certified copy of each and all of the following pleadings which were filed by leave of court, in the above entitled suit on the 1st day of March, 1918, viz: Amendment to Bill of Complaint; Amendment to Answer of Jules S. Bache et al, to the Answer and Cross-Bill of Edwin G. Merrill et al; Amendment to the Answer of Jules S. Bache et al to the Cross Bill of Central Trust Company of New York as Trustee; Amend-

ment to the Answer of The Western Union Telegraph Company to the Answer and Cross-Bill of Edwin G. Merrill et al; Amendment to the Answer of The Western Union Telegraph Company to Cross-Bill of Central Trust Company of New York as Trustee; Answer of Toledo, St. Louis & Western Railroad Company to the Answer and Cross-Bill of Edwin G. Merrill et al and cross-bill of Toledo, St. Louis & Western Railroad Company; and Answer of Toledo, St. Louis & Western Railroad Company, to the Cross-Bill of Central Trust Company of New York as Trustee."

Upon this notice there was endorsed the following: "Cincinnati, Ohio, March 9, 1918. Received original of the above notice and certified copies of pleadings therein enumerated. Lawrence Maxwell, per M. Hackett, Solicitor for Chicago, R. I. & Pacific Ry. Co."

On March 11, 1918, said notice and acknowledgment having been brought to the attention of the court, the court considered further the evidence which had been introduced with respect to the entry of appearance of The Chicago, Rock Island and Pacific Railway Company in said suit and from said evidence the court in the exercise of its judicial discretion found that The Chicago, Rock Island and Pacific Railway Company had entered its appearance in and had become a party to

said cause and had fully submitted itself to the jurisdiction of said court for all proper purposes as a party thereto, and that it should properly be required to answer in said cause the claim asserted in said cross-bill of The Toledo, St. Louis and Western Railroad Company, filed on March 1st, 1918.

And thereupon on March 11, 1918, the court entered an order in which it was recited that the solicitors for the Toledo, St. Louis and Western Railroad Company and other parties had "filed in this suit copy of notice to Chicago, Rock Island and Pacific Railway Company, Lawrence Maxwell, Solicitor, and made due proof that the original of said notice together with duly certified copies of \* \* \* answer of Toledo, St. Louis and Western Railroad Company to answer and cross-bill of Edwin G. Merrill et al, and cross-bill of Toledo, St. Louis and Western Railroad Company, \* \* \* the originals of which pleadings were filed in this suit on the first day of March, 1918, were duly delivered to and served upon Lawrence Maxwell, Solicitor for Chicago, Rock Island and Pacific Railway Company in this suit on the 9th day of March, 1918," and in which order the court found that the Chicago, Rock Island and Pacific Railway Company "has heretofore entered its appearance as a party to this suit" and by which it was ordered that the Chicago, Rock Island and Pacific Railway Company "be accorded and allowed ten

days from the date of the entry hereof within which it is required to reply to the said cross-bill of Toledo, St. Louis and Western Railroad Company, and to such, if any of the other above enumerated pleadings as said Chicago, Rock Island & Pacific Railway Company may desire to reply, and in default of such reply a decree *pro confesso* against The Chicago, Rock Island & Pacific Railway Company may be entered on said cross-bill of Toledo, St. Louis & Western Railway Company, and upon the other above enumerated pleadings as in default. \* \* \* \*

On March 20, 1918, the Chicago, Rock Island and Pacific Railway Company filed a motion in said cause of which a copy appears upon page 11 of the petition herein.

Said motion of the Chicago, Rock Island and Pacific Railway Company was duly submitted to the court and evidence in support of and in opposition to said motion was heard and considered by the court and the court, in the exercise of its judicial discretion and for reasons which the court deemed proper including the reasons set forth in an opinion filed by it in said cause November 3, 1919, a copy of which appears on pages 19 to 21 inclusive of the petition herein, entered an order overruling said motion and fixing a time within which the Chicago, Rock Island and Pacific Railway

Company might plead to said several pleadings filed March 1, 1918, which order, so far as material herein, was as follows:

"This cause came on to be heard upon the motion of the Chicago, Rock Island and Pacific Railway Company filed herein on March 20, 1918, to set aside the finding and order of the court entered March 11, 1918. On consideration whereof said motion is overruled to which the Chicago, Rock Island and Pacific Railway Company excepts and said Chicago, Rock Island and Pacific Railway Company within twenty days from the date of the entry hereof is required to plead to said cross-bill of Toledo, St. Louis and Western Railroad Company and to such, if any, of the other pleadings enumerated in said order of March 11, 1918 \* \* \* as said Chicago, Rock Island and Pacific Railway Company may desire to plead to and in default thereof a decree *pro confesso* against Chicago, Rock Island and Pacific Railway Company may be entered upon said cross-bill of said Toledo, St. Louis and Western Railroad Company and upon the other above enumerated pleadings as in default. The Chicago, Rock Island and Pacific Railway Company excepts to said order upon the grounds that the court is without jurisdiction to make the same or to require it to plead to said pleadings or any of them and because it is not a resident of the State of Ohio."

On December 3, 1919, the Chicago, Rock Island and Pacific Railway Company filed a motion in said cause, a copy of which appears upon pages 12 and 13 of the petition herein.

The motion of the Chicago, Rock Island and Pacific Railway Company, filed on December 3, 1919, came duly on for hearing and was heard on evidence by the court and the court in the exercise of its judicial discretion and for reasons which the court deemed proper including the reasons set forth in an opinion filed April 15, 1920, a copy of which appears on page 22 of the petition herein, filed on April 15, 1920, an order overruling said motion, a copy of which order appears upon page 13 of the petition herein.

On May 6, 1920, the Chicago, Rock Island and Pacific Railway Company filed in said cause an answer to the cross-bill of Toledo, St. Louis and Western Railroad Company in which, among other things, it admits that "it deposited with the Trust Company 144,200 shares of the common stock and 45,100 shares of the preferred stock of the Alton Company and received in exchange \$5,047,000.00 par value of the series B bonds and \$4,510,000.00 par value of the series A bonds of the Toledo, St. Louis & Western Railroad Company" and further "that at the time of the purchase of the Alton stock by the defendant Toledo, St. Louis and Western Railroad Company, Edwin Hawley



was a director and vice-president of said defendant corporation" and "that on or about the 4th day of October, 1907, said Edwin Hawley received from the hands of officers of this defendant the sum of \$193,000.00."

Said answer further admits "that \$5,047,000.00 par value of the said B bonds and \$400,000.00 par value of said A bonds were owned by this defendant until the formation of the Bondholders' Committee composed of Edwin G. Merrill et al, intervenors in this cause, and allege that shortly thereafter this defendant transferred to and deposited with said committee under and pursuant to the terms of the deposit agreement dated August 3, 1914, all of its said A bonds and all of its said B bonds."

The evidence upon which the court acted in making the findings and orders of which complaint is made in said petition is not set out in said petition. Respondent denies the statement in the brief for petitioner that "The only basis for the claim that the District Court has jurisdiction of the person of the Rock Island Company is that Mr. Maxwell entered its appearance by appearing as counsel for the Bondholders' Committee." The original entry of appearance by Mr. Maxwell quoted in the petition and in the brief is only one item

out of a large number of items of evidence considered by the court upon this point.

No steps were taken by petitioner to preserve and have certified a record of the evidence submitted on the hearings of said motions or to obtain a review of the orders complained of by appeal or error proceedings.

Having made full and due return to said rule, respondent prays that said rule may be discharged and that said petition may be dismissed.

JOHN M. KILLITS,

*Judge of the United States Court for the  
Northern District of Ohio, Western Division.*

